No. 93-349

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

UNITED STATES OF AMERICA,

Respondent,

V.

ROYAL BUICK, INC.; BRIAN SMITH; EUGENE MARANO; RALPH RODRIGUEZ; EDWIN W. MUGFORD, III; DAVID ROEMER,

Petitioners.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI OF EDWIN W. MUGFORD, III

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QUESTIONS PRESENTED

I. IN THE ABSENCE OF OTHER GROUNDS FOR ADMISSIBILITY AND A LIMITING INSTRUCTION ON THE JURY'S CONSIDERATION OF THE EVIDENCE, WHETHER THE TRIAL COURT'S ADMISSION OF NINE CUSTOMER CREDIT APPLICATIONS PURSUANT TO RULE 803(6) OF THE FEDERAL RULES OF EVIDENCE IS REVERSIBLE ERROR WHERE THE SOURCE OF THE INFORMATION IN EACH OF THEM IS A THIRD PERSON NOT ACTING IN THE REGULAR COURSE OF THE BUSINESS WHO IS NOT CALLED TO TESTIFY, AND THE DOCUMENTS REPRESENT THE ONLY EVIDENCE AGAINST THE ACCUSED IN CRIMINAL COUNTS RELATED TO THE FALSIFICATION OF THE CREDIT APPLICATIONS?

II. WHETHER AN ACCUSED'S SIXTH AMENDMENT RIGHTS TO CONFRONT THE WITNESSES AGAINST HIM ARE VIOLATED IN A CRIMINAL PROSECUTION CHARGING FRAUD INVOLVING THE FALSIFICATION OF NINE CREDIT APPLICATIONS WHEN THE GOVERNMENT FAILS TO CALL AS WITNESSES THE CUSTOMERS WHOSE SIGNED CREDIT APPLICATIONS ARE ALLEGED TO HAVE BEEN FALSIFIED AND THERE IS NO OTHER EVIDENCE PRESENTED THAT HE FALSIFIED THESE OR ANY OTHER CREDIT APPLICATIONS?

III. WHETHER AN ACCUSED'S CONVICTIONS FOR CONSPIRACY AND CRIMINAL FRAUD MUST BE REVERSED WHEN THERE IS NO DIRECT EVIDENCE OF HIS GUILT AND THERE IS STRONG AND REASONABLE EVIDENCE TO SUPPORT THE PRESUMPTION OF INNOCENCE?

United States v. ROYAL BUICK, INC.

CERTIFICATE OF INTERESTED PERSONS AND
CORPORATION DISCLOSURE STATEMENT

First Union National Bank, Successor in interest to Florida National Bank, a victim

Hon. Wm. Terrell Hodges, United States District Judge

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OPINIONS BELOW

The Court of Appeals for the Eleventh Circuit did not render an opinion in this case, but on June 3, 1993, entered an Order affirming the convictions. A copy of the Order is attached in the appendix hereto, p. vi, *infra*. By Order entered August 6, 1993, the Court of Appeals denied Mugford's Suggestion for Rehearing *en banc*. A copy of the Order is attached in the appendix hereto, p. vi, *infra*.

No opinion was written by the United States District Court for the Middle District of Florida.

JURISDICTIONAL STATEMENT

This petition for certiorari is made pursuant to 28 U.S.C. § 1254 (1).

Jurisdiction for this appeal arises pursuant to 28 U.S.C.§ 1291, from a final judgment entered following trial and

conviction of appellant for violation of federal conspiracy and fraud laws in the United States District Court for the Middle District of Florida before the Honorable Wm. Terrell Hodges.

Jurisdiction arose in the district court pursuant to 18 U.S.C. § 3231.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V, provides in pertinent part:

"No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;"

United States Constitution, Amendment VI, provides in pertinent part:

"In all criminal prosecutions the accused shall enjoy the right ... to be confronted with the witnesses against him."

STATEMENT OF THE CASE

Mugford became employed as a salesman for Royal Buick in the spring of 1986. He was a recent college graduate. He began working for Royal Buick to learn the automobile sales business in anticipation of joining his father in the management of Royal Oldsmobile Company, a Richmond, Virginia automobile sales dealership. At that time, Royal Buick was owned and managed by a childhood friend of Mugford's father, Mr. Ralph Ghiotto. It was at his father's suggestion that Mugford sought employment with Ghiotto's company. (R42, pp. 5-22).

Edwin W. Mugford, III, along with other salesmen and sales managers of his former employer, Royal Buick, Inc., a Tampa, Florida automobile sales company, and a bank official, was tried by a jury for offenses charged in a superseding

federal grand jury indictment of numerous criminal counts involving fraud and conspiracy. The indictment generally alleged that the defendants, including the corporation, conspired to defraud Florida National Bank (a federally insured bank) by falsifying the credit applications of a certain class of customers who otherwise would not have qualified for used car loans. (Doc.No.301).

At the close of the government's case-in-chief, most of the charges against Mugford were voluntarily dismissed. The trial court denied Mugford's motion for a verdict of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure (F.R.Cr.P.). (R38, pp. 36-38, 136, 140-141, 143). The case continued against Mugford on the following counts:

> Count 1, general conspiracy. 18 U.S.C. § 371.

> Count 10, bank fraud involving the credit application of customer Shelby Pryor. 18 U.S.C. § 1344.
>
> Count 19, mail fraud involving the credit application of customer Samuel Caperton. 18 U.S.C. § 1341.
>
> Count 49, submitting a false loan application of customer Tracey Kenty to a federally insured bank. 18 U.S.C. § 1014.
>
> Count 50, submitting a false loan application of customer Jeffrey Mosley to a federally insured bank. 18 U.S.C. § 1014. (App., pp. xii-xxviii)

Mugford was acquitted on Count 50 (Doc. No. 600), and convicted of the remaining counts (Doc. No. 591).

On May 9, 1991, the trial court overruled Mugford's motion for judgment of acquittal and sentenced him to three years probation on the four counts and imposed a fine of $200.00. (App., p. x). Mugford timely appealed the convictions to the Court of Appeals for the Eleventh Circuit.(Doc. No. 664). On June 3, 1993,

that court affirmed the convictions without opinion. No petition for rehearing was sought. Mugford filed a Suggestion for Rehearing *en banc* on June 23, 1993. The Court of Appeals denied this petition and also denied a panel rehearing by Order entered August 6, 1993.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's finding that the business records exception to the Hearsay Rule permits admission of hearsay evidence when the party supplying the information was not acting in the regular course of business and there was no guarantee of the trustworthiness of the information directly conflicts with the construction of the Rule as stated in the decisions of this Court, other federal courts of appeal, and at the highest courts of at least two of the states.

Rule 803(6) of the Federal Rules of

Evidence does not permit the introduction into evidence of the expressed or implied hearsay statements of third parties contained in business records when "...the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Wilkerson stated that the source of the information in each of the credit applications at issue was the customer; and, by later implication, that the customer could misstate his credit history because most creditors did not report to the credit bureau and there was no means by which the salesman taking the information could verify it (R17, pp. 176-7; R18, p.12). Even after hearing this testimony, the district court allowed the Government to introduce into evidence under the 803(6) exception to the hearsay rule eleven credit applications in which Mugford was the named salesman.

This ruling was plain error. It was contrary to the Advisory Committee Notes (1987 Amend.) to Rule 803(6), the decisions of the federal courts of appeal for the Second, Fifth, Sixth, Seventh, Ninth and Tenth Circuits, and of the courts of last resort of the states of New York and Arizona.

Because the customer supplying the information in nine of the credit applications was not called to testify, those credit applications alone formed the basis for the convictions on appeal.

It is patently obvious the Government sought admission of the documents *en masse* to obviate the need to call each customer as a witness at trial and to establish by implication that Mugford falsified the credit applications.

However, having failed to convince the jury that Mugford falsified Mosley's

credit application, and later conceding that another defendant falsified Burns's credit application, the Government relies only on the nine remaining credit applications as "proof" that Mugford falsified the credit applications of Caperton, Pryor, and Kenty to support his convictions on substantive counts 10, 19 and 49, along with the other six credit applications to support the conviction for conspiracy. There is no legal precedence to support the use of the questioned documents for such a purpose under the facts in this case, and the cases cited in the Government's brief do not apply.

The admission of the documents[1] was

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[1] The documents in question are the credit applications contained in Government Exhibits 9, 41, 53, 285, 287, 289, 291, 293, and 295. The applications in Government Exhibits 3 (customer Hedrick Burns) and 7 (customer Jeffrey Mosley) are not subject to objection because these customers testified.

prejudicial error because it denied Mugford his fundamental right under the Sixth Amendment to confront the witnesses against him, and denied him due process under the Fifth Amendment because it reduced the government's burden to prove each and every element of the offenses charged beyond a reasonable doubt.

The Eleventh Circuit and the district court erred in refusing to reverse the convictions when, as a matter of law, the evidence created at most a mere

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At pages 29-32 of the Government's appellate brief (hereafter, this will be referred to as "GB"), the applications are discussed in detail. Mugford adopts the description of the false statements as described therein, but disputes that his convictions can be sustained on the basis of the fraud alleged in rebates and down payments shown on the credit applications for customers Pryor (53A), Johnson (285A), Delgado (291A), and Hartman (293A), because the evidence at trial was that the managers closed the loans and were responsible for those parts of the credit applications. (R19, pp.35, 36; R33, pp. 153, 154).

possibility Mugford falsified the nine credit applications in evidence about which the customers did not testify. The failure to reverse was prejudicial error and is contradictory to this Court's recognition in ***Sullivan v. Louisiana***, ___ U.S. _____, 113 S.Ct. 2078, 124 L.Ed.2d 182, 61 U.S.L.W. 4518 (1993) that the prosecution must prove all elements of the offense charged and must persuade the factfinder beyond a reasonable doubt of the facts necessary to establish each of those elements, and its holding in ***Ingram v. United States***, 360 U.S. 672, 79 S.Ct. 13, 14, 3 L.Ed.2d 1503, *reh'g denied* 361 U.S. 856, 80 S.Ct. 42, 4 L.Ed.2d 96 (1959), that convictions obtained by piling inference upon inference must be reversed.

ARGUMENT

I. IT WAS REVERSIBLE ERROR TO ADMIT THE

CUSTOMER CREDIT APPLICATIONS PURSUANT TO RULE 803(6)

Notwithstanding the Government's alternative arguments in its appellate brief (at pages 104-107) that 1) the credit applications were admissible pursuant to other hearsay exceptions, and 2) the credit applications were not hearsay because they were not admitted for the truth of the matters asserted therein, the trial court determined them to be hearsay and admitted them under the business records exception to the hearsay rule under Rule 803(6) of the F.R.Ev. (R17, p. 171). The only limitation the trial court placed on the use of the applications was that it would exclude those not within the time-frame of the alleged conspiracy. *Ibid.*

While Mugford does not dispute the admissibility of the Mosley and Burns

applications because the customers later authenticated these applications, admission of the remaining nine applications was reversible error. Without testimony from the customer authenticating them, those credit applications lacked the requisite "indicia of reliability," required for admission under a proper exception to the hearsay rule. *See,* ***Ohio v. Roberts***, **448 U.S. 56, 63, 100 S.Ct. 2531, 2539, 65 L.Ed 2d 597 (1980)** and cases recited therein.

This being the sole evidence against him, the error was not harmless. There was no other evidence linking Mugford to the conspiracy or to the falsification of the other two credit applications. Absent the improper admission of the applications, Mugford's convictions could not stand.

A. The Credit Applications Were Not Otherwise Admissible Under Any Exception to the Hearsay Rule

The Government contended on appeal that the documents would have been otherwise admissible under the following exceptions to the hearsay rule: 1) as statements of Royal Buick agents (801(d)(2)(D)); or 2) as statements of coconspirators (801(d)(2)(E)) (G.B. at 107). The appeals court apparently concurred in this analysis, but it is an incorrect application of the rules of evidence for the following reasons.

To begin, Rule 801 of the Federal Rules of Evidence defines the relevant terms applicable to the section on hearsay. Rule 801(a) defines "statement" as "(1) an oral or written assertion;" Rule 801(b) defines "declarant" as "a person who makes a statement;" and Rule 801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing,

offered in evidence to prove the truth of the matter asserted." The terms so defined must be used in analyzing the proffered evidence to reach a determination as to their admissibility. Critical to the analysis of this case is who is the declarant in the questioned credit applications.

The Government contends Mugford is the declarant because his name appears on the face of the credit applications and in the other documents as the salesman. In making this assertion the government relies first on Wilkerson's testimony that the salesmen were instructed to write them from information supplied by the customer (R17, p. 177), and second, on the testimony of Wilkerson and others that employees of the dealership made false entries on them. (R21, pp. 36, 37; R27, pp. 207-210). The Government's own

evidence is insufficient to establish this premise for the following reasons.

Wilkerson's testimony that the *customer* supplied the information to the salesman imports that the customer is the person making the statement. By definition the person making the statement is the "declarant." F.R.Ev. 801(b). The document itself supports that conclusion because the customer signed each one attesting to the veracity of the information. This evidence shows the salesman is the mere scrivener of the customer's oral statement and is not the declarant.

Wilkerson's testimony and the testimony of others that managers and other employees of the dealership falsified the credit applications gives rise to an inference that someone other than the customer may be the declarant of the false information. But there was no

evidence that Mugford falsified those in evidence.

His name as the salesman on the credit applications does not alone identify him as the declarant or scrivener. *See,* ***United States v. Lieberman***, 637 F.2d 95 (2d Cir.1980) [absent proof of independent verification by hotel employee, guest registration card not admissible under business records exception to hearsay rule to prove person named therein was the defendant though it was admissible to prove someone using defendant's name registered at hotel on that date]. No testimony established it was the regular practice of Royal Buick to verify that the salesman shown on the credit application was the salesman handling the transaction, though there was other evidence establishing salesmen sometimes wrote up applications using

another's name. (R27, pp. 207-210).

No customer testified that Mugford was the salesman on any of the nine transactions in issue. No handwriting expert or other person familiar with Mugford's handwriting was called to testify Mugford wrote the applications in question.

To the contrary, as to one of the credit applications not at issue here, the government's own witness testified that the only false entries (Ward's and VISA) on Hedrick Burns' credit application was in the handwriting of defendant Rick Taylor, although Mugford was shown on the face of the application as the salesman. (Gov't Exhibit 3A; R33, pp. 194, 195).

Since it failed to prove Mugford was connected to the credit applications, and there was no other evidence (foundation or otherwise) of his participation in the

conspiracy alleged, the Government failed to establish the admissibility of the documents under either the 802(d)(2)(D) and (E) exceptions, or under any other exception to the hearsay rule.

B. *The Documents Contained Hearsay That the Government Used to Mugford's Detriment*

However, confusion abounds in the record and in the Government's brief as to the purpose for which the credit applications were introduced. In addition to the 802(d) exceptions, the Government states the credit applications were admissible as non-hearsay because they were not introduced for the truth of the matters asserted, but merely to establish that statements relating to the customer's financial condition and credit history were made which the Government, though other evidence showed to have been false.

Taking the Government at its word,

the argument has merit only if the credit applications were used for that purpose and if the documents tend to prove an essential element of the crime charged. But the Government's argument is flawed because the documents were used not only to prove an essential element of the crime, but also to prove Mugford was the person committing the crime.

In no less than three instances in its appellate brief, the Government admits the disputed credit applications were necessary to prove Mugford's participation in the conspiracy (G.B. at 60), his responsibility for the nine false loan applications (G.B. at 61), and that they "were the most significant documents in the files, those needed to prove the fraudulent offenses." (G.B. at 108).

For the reasons previously stated above, the documents themselves were

insufficient to identify Mugford as the declarant of the false statements in them. There was no foundation laid to link him to the credit applications before their introduction so they were not probative evidence of his participation in the conspiracy alleged or of criminal conduct on his part.

Had the Government sought the admission of the documents for the non-hearsay purpose stated, it would have deleted Mugford's name from them until such time as it laid a foundation to link him to the questioned falsifications. Rather, by admitting the applications without deleting his name the Government used them not only to demonstrate a false entry was contained in them but also to prove Mugford was the person who falsified them.

While the credit applications may

have been relevant to demonstrate that each contained one false entry, they were not relevant to prove the declarant was Mugford without other evidence linking him to the false statements.

That the Government was aware of the necessity to offer independent evidence of Mugford's authorship of the false information to the questioned credit applications is demonstrated by its attempts to link him to the false statements in the Mosley and Burns credit applications through the testimony of those customers.

Mosley (whose credit application formed the basis for Count 50) was called first to offer evidence against Mugford. He was unable to identify Mugford as his salesman by face or proper name, although he testified immediately before he failed to make an in-court identification that he

recalled what his salesman looked like and could identify him. (R33, p. 20). On examination by Mugford's counsel, Mosley was so discredited as a witness that the jury acquitted Mugford on the charges in Count 50.

The other customer called by the Government to link Mugford to a false credit application was Hedrick Burns. He was unable to properly identify Mugford by name and was not even asked to attempt an in-court identification. Like Mosley, Burns' testimony was discredited upon examination by the defense. As a result of Burns' poor testimony and the testimony of coconspirator Glasgow (R33, pp. 194, 195), the Government's attorney conceded in his closing argument to the jury that the false information on the Burns application was not Mugford's work, but was placed on the credit application by codefendant Rick

Taylor. (R44, pp. 43, 44).

As in the instances of Mosley and Burns, the remaining credit applications in issue merely indicate, not identify, Mugford as the salesman in the transactions. They do not, by themselves, prove him to be the declarant of the false information contained in them. But that was the purpose for which the Government used their admission.

In the apparent belief that the whole is greater than the sum of its parts, the Government sought to admit the credit applications *en masse* to accomplish what it failed to achieve through the testimony of Mosley and Burns; to-wit, the identification of Mugford as the person falsifying the credit applications. Somehow, nine disputed documents were to buttress each other as a substitute for the lack of other evidence necessary to

authenticate the individual documents. The use of the nine applications to identify Mugford as the perpetrator of the crimes alleged refutes the Government's claims that they were not offered for the truth of the matters asserted.

C. *Because They Did Not Meet The Threshold Requirements of The Business Records Exception The Credit Applications Were Inadmissible*

Although the Government made no proffer for the intended use of the documents when objections were made to their introduction, it is obvious the court determined them to be hearsay because it admitted them pursuant to the 803(6) exception to the hearsay rule. In actuality, the documents contained two levels of hearsay.

The first level of hearsay was the information in them was contained in Royal's records. Apparently, this would be

admissible under the 803(6) exception to the hearsay rule if its relevance was shown to the prosecution's case. As discussed above, the dual use made of them by the Government primarily was to show by implication that Mugford was the declarant who falsified the credit applications. Standing alone they were not relevant for that purpose.

However, the second level of hearsay was that of the customer's assertion, implied from the manner in which the Government presented its case, that the false information was from someone at the dealership rather than the person supplying the information to the dealership. By not calling the customer to testify about the credit application, the jury was allowed to improperly infer that the customer was without fault.

This is not the law and its use in

this manner flies in the face of the personal protections underlying the hearsay rule. The various exceptions to the hearsay rule permit the introduction of hearsay provided the evidence falls within a class deemed reliable. Among the highly regarded exceptions is the business records exception because in traditional settings the hearsay is reliable. But not all business records qualify.

In applicable part, Rule 803(6) provides that the admission of records kept in the regular course of a business are not excluded by the hearsay rule

> ". . . unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness."

A fair reading of the 803(6) does not indicate that if the questioned document meets a part of the qualification for admission, then the trial court may admit

the document. Rather, the exception imports that the trial judge determine that all requisite factors are met to insure its veracity and reliability. To hold otherwise frustrates the purpose and intent of the Rule, which is to permit the admission of evidence not otherwise admissible as hearsay.

The Second Circuit noted 16 years ago, Rule 803 is "...*not* designed to insure the *admissibility* of the questioned evidence [but] only designed to prevent its automatic exclusion on hearsay grounds," *United States v. Oates*, 560 F.2d 45, 65 (2d Cir.1977), *aff'd.*, 591 F.2d 1332 (1978). There has been no shift in the law on that concept in the interim. Stated in other words, as to hearsay evidence the business records exception is a sieve, not a floodgate.

By upholding Mugford's convictions

the Eleventh Circuit determined hearsay evidence to be admissible even when the most basic prerequisites of the applicable exception have not been met. This marks an unprecedented departure not only from the plain language of the law, but also from the Advisory Committee Notes to Rule 803(6) [2] and the decisions of the courts of appeal of the other federal judicial circuits and state courts which have

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[2] In relevant part, the Advisory Committee [1987 Amend.] notes as follows:

> Sources of information presented no substantial problem with ordinary business records. All participants, including the observer or participant furnishing the information to be recorded, were acting routinely, under a duty of accuracy, with employer reliance on the result, or in short, "in the regular course of business." If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may have been recorded with scrupulous accuracy is of no avail.

considered this question. [3]

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[3] *See*, ***Wilson v. Zapata Off Shore Co.***, 939 F.2d 260, 271 (5th Cir.1991) [hospital record not admissible under Rule 803(6) because it contains double hearsay where the source of the information is an outsider and therefore the record does not have the presumption of accuracy that documents prepared in the regular course of business have]; ***Datamatic Services, Inc. v. United States***, 909 F.2d 1029, 1032-33 (7th Cir.1990) [where source of information in letter was outsider Rule 803(6) does not by itself permit the admission of a business record]; ***United States v. Bortnovsky***, 879 F.2d 30, 34 (2d Cir. 1989) [although insurance adjuster's report might otherwise qualify as business record within meaning of 803(6), third party's statement contained therein does not satisfy the rule's requirements because there was no showing that source had a duty to report the information that he was quoted as having given]; ***United States v. Snyder***, 787 F.2d 1429, 1433-34 (10th Cir.1986), *cert. denied*, 479 U.S. 836, 107 S.Ct. 134, 93 L.Ed.2d 78 (1986) [statements of inmates incorporated into police officer's report bars admission of the report because statements not entitled to presumption of reliability and regularity accorded a business record and introduction of inmates' statements would impermissibly insulate them from the test of cross-examination]; ***United States v. Pazsint***, 703 F.2d 420, 424-25 (9th Cir.1983) [tapes of emergency calls not admissible though made in the regular

(continued...)

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[3](...continued)
course of business because callers under no business duty to report and cannot be given the presumption of reliability and accuracy]; ***Clark v. City of Los Angeles***, 650 F.2d 1033, 1037 (9th Cir.1981), *cert. denied*, 456 U.S. 927, 102 S.Ct. 1974, 72 L.Ed.2d 443 (1982) [diary replete with hearsay and multiple hearsay not independently admissible is not otherwise admissible under business records exception to hearsay rule]; ***United States v. Lieberman***, 637 F.2d 95, 100-101 (2d Cir.1980) [while hotel guest registration card was admissible to show someone representing himself as defendant registered at hotel on particular date, absent proof that it was regular course of business of hotel employee to independently verify such information, registration card not admissible to show defendant was the person named]; and ***United States v. Yates***, 553 F.2d 518, 521 (6th Cir.1977) [finding that part of letter not within business records exception because it contained statement outside the scope of business]. *See also*, ***Hoffman v. Palmer***, 129 F.2d 976, 980 (2d Cir.1942), *aff'd*, 318 U.S. 109, 63 S.Ct. 757, 87 L.Ed. 645 (1942), *and reh'g denied*, 318 U.S. 800, 63 S.Ct. 757, 87 L.Ed. 1163 (1943) [deceased train engineer's statement contained in employer railroad's memorandum of interview of him relative to accident not admissible under common law business records exception to hearsay rule where it appears source of information had more than minimal or

(continued...)

While the trial court did inquire of the testifying witness if the records were of the type normally maintained in the regular course of Royal's business (R17, pp. 170, 171), it failed to make the second inquiry necessary to determine if either the source of the information indicated a lack of trustworthiness or if the method or circumstances of preparation indicated a lack of trustworthiness. Rule 803(6). Inherent in this determination was

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[3](...continued)
marginal motive to misrepresent]; *Johnson v. Lutz*, 253 N.Y.124, 127-28, 170 N.E.2d 517 (1930) [police officer's accident report incorporating bystander's statements not admissible under business records exception to hearsay rule because bystander under no business duty to report]; and *State v. McGann*, 132 Ariz. 296, 645 P.2d 811, 813-814, at footnote 1 (1982) [customers' statements that their signatures on credit card receipts were not authorized, whether shown directly by the statements in the records by oil company's business practices, barred admission of oil company records business record under state's evidence rule 803(6)].

the trial judge's duty to be satisfied that the source of the information, the customer, had "no particularly powerful motive to misrepresent." ***Hoffman v. Palmer***, ***supra.***, **129 F.2d at 980.** One need look no further in the record than Wilkerson's testimony to conclude that the credit applications satisfied neither requirement, and the trial court failed to make the necessary inquiries.

The defendants' *voir dire* of Wilkerson bears scrutiny because it raises serious questions as to his qualification as the witness through which the documents could be admitted. He testified he "had access" to all the files, but was only familiar with those representing his personal sales transactions. He admitted he was not the custodian of the records, and had left the employment of Royal Buick in 1988, more than two years prior to his

testimony (R17, pp. 166-171). Mere access to business records and familiarity with them is not sufficient to qualify a witness for the introduction of business records. *See, United States v. Porter*, 821 F.2d 968, *cert. denied*, 485 U.S. 934, 108 S.Ct.1108, 99 L.Ed.2d 269; and *cert. denied by Bell v. United States, 485 U.S. 934, 108 S.Ct. 1108, 99 L.Ed.2d 269 (1988)* [security officer having access to files of closed company not a qualified witness for introduction of company's personnel cards because he did not work in personnel office and was not familiar with company's record keeping requirements].

After the court admitted the documents it was learned through Wilkerson the source of the information in the credit applications was the customer, not the person writing it or another employee of Royal Buick. The foundation thus laid

by Wilkerson for admission was that the customer supplied the information in them and the salesman wrote what the customer related (R17, pp. 176, 177). He failed to state that the salesmen taking the information had a duty or the means to verify the information. Wilkerson's testimony also indicated the types of customers targeted by the "Betty Moses" program were those having bad credit or poor credit histories (R18, p. 20).

That foundation testimony established that the source of the information in each of the credit applications was a person acting outside the scope of the business and not an employee having a duty to report accurately; and, who, because they wanted to purchase a car and had bad or poor credit, possessed an obvious motive to lie.

Given that testimony, the trial court

was required by the plain language of Rule 803(6) to exclude the credit applications for two reasons: first, because the source of the information was not acting in the regular course of business; and second, because the methods or circumstances of preparation indicated a lack of trustworthiness.

The trial court disregarded these factors in making its evidentiary ruling, relying instead on the testimony that it was the regular practice of the business to keep such records. (R17, p. 171).

Notwithstanding that the defense objection to admission of the credit applications did not address specifically these arguments,[4] the court's ruling was

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[4] By pre-trial order and agreement of the several defense counsel, counsel for Royal Buick was designated by the court as lead counsel for purposes of making objection. Current counsel did not represent Mugford at the trial.

plain error having a devastating effect on Mugford's defense.

In this criminal prosecution for fraud the ultimate jury question was who was the person making the false statement, the person writing the information (the salesman) or the declarant supplying it (the customer). The government expressed no intent to call the nine customers, nor did it offer explanation that the customer was unavailable to testify. The testimony of the foundation witness was at best equivocal as to the source of the information in the documents. The records themselves do not reveal the identity of the author of the false information. Under such circumstances the records are without probative value absent corroborative evidence to show the defendant authored the falsities. For these reasons that evidence should have been excluded.

Review of a recent Arizona Supreme Court decision evaluating a similar fact pattern illustrates the problems created by the liberal construction of the business records exception applied by the trial court in this case.

In *State v. McGann*, 132 Ariz. 296, 645 P.2d 811, 813-14, (1982), McGann was convicted on each of four counts charging he had forged the signature of a customer of the gasoline service station where he worked to obtain the cash equivalents for those charges. Faced with a very similar set of facts on appeal, the Arizona Supreme Court reversed the appellant's fraud convictions because the trial court improperly admitted hearsay evidence fundamentally damaging to the rights of the accused. The complaining customer involved in the four counts in the indictment testified at trial that the

signatures on the four questioned credit card receipts were not his, nor authorized by him.

However, 57 credit card receipts of three other customers who did not testify were admitted through the service station owner, who testified that pursuant to its usual business practice, the oil company back-billed him for the charges evidenced by those receipts upon the customers' representations that the signatures were unauthorized. At footnote 1 to the opinion, the Arizona Supreme Court said:

> It could be argued that the evidence of the back-billing by Chevron fits within the business records exception of Rule 803(6).[5] The exception does

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[5] The source of Arizona Rules of Evidence 803 is Rule 803 of the Federal Rules of Evidence. The business records exception is essentially identical to Rule 803(6) of the federal rules. The text follows:

> (6) Records of regularly conducted
> (continued...)

not apply in this case for two reasons. First, the station manager was not a custodian of Chevron's records or an otherwise qualified Chevron employee as required by Rule 803(6)(e). Second, the evidence

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[5](...continued)
activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, if: (a) Made at or near the time of the underlying event, (b) by, or from information transmitted by, a person with first hand knowledge acquired in the course of a regularly conducted business activity, (c) made and kept entirely in the course of that regularly conducted business activity, (d) pursuant to a regular practice of that business activity; and (e) all of the above are shown by the testimony of the custodian or other qualified witness.

However, such evidence shall not be admissible if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness or to the extent that portions thereof lack an appropriate foundation.

The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

> involves two levels of hearsay, and the second does not fit within the exception. Chevron's records are the first level of hearsay. The fact that Chevron's records show that the station manager was back-billed is within the business records exception.
>
> *But customers' statements that their signatures were unauthorized, whether shown directly by the statements in the records or by inference from Chevron's business practices, constitute a second level of potential hearsay. . . In the instant case, the effect of the station manager's testimony was to introduce the out-of-court statements of [the customers who did not testify] to Chevron to prove that their signatures were not authorized. The taint of hearsay is not dissipated merely because they are contained in business records. The testimony was hearsay not within the business records exception.* [emphasis added]

Though not apparently required to do so to reach its conclusion, the Arizona Supreme Court sagely interpreted the business records exception exactly as the trial court should have done in Mugford's case.

It is obvious in this case the trial court failed to make the proper ruling and

the court of appeals failed to reverse it. As a result, Mugford was convicted on this erroneously admitted evidence because the jury was allowed to rely upon it to improperly infer the customers' statements would be that they did not lie to Mugford.

II. THE IMPROPER ADMISSION OF THE NINE CREDIT APPLICATIONS DENIED MUGFORD HIS FUNDAMENTAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM IN VIOLATION OF THE SIXTH AMENDMENT

Under the authority of *McDaniel v. United States*, 343 F.2d 785 (5th Cir.1965), *cert. denied*, 382 U.S. 826, 86 S.Ct. 59, 15 L.Ed.2d 71 (1965), the trial judge was required before making his evidentiary ruling on the admissibility of the credit applications "to determine in each instance whether such documents are constitutionally admissible under the Sixth Amendment guarantee of

confrontation."[6] The record is bare the trial court made such a determination except to the extent that he permitted them to come in under the 803(6) exception to the hearsay rule.

The Sixth Amendment to the Constitution guarantees an accused the right to confront the witnesses against him. In pertinent part it provides

> "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him."

In the convictions subject to this appeal, the sole "witnesses" against Mugford were the credit applications. Not one customer testified that Mugford, rather than the customer himself, was the source of the false information in the credit

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[6] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981), the Eleventh Circuit adopted as binding all decisions of the Fifth Circuit made prior to the close of business September 30, 1981.

application at issue. As specifically explained in the preceding section of the brief, those documents, *even if they were properly admitted*, were insufficient evidence to support the convictions because the source of the information was not shown by other evidence to be Mugford.

But because the credit applications were improperly admitted, the Government did not have to call the customers as witnesses. Rather, the court's ruling wrongfully permitted the Government to convey to the jury two implications of fact not supported by the evidence in the case: 1) that because none of the customers was charged with any crime the Government had concluded from its investigation that the customers were not the sources of the false information in the credit applications; and, 2) had they been called to testify, each customer

would deny he authorized the false statements in the credit applications.

In effect, the Government's burden of proving the necessary elements of each of the crimes charged which related to the nine questioned credit applications was substantially reduced, if not entirely eliminated. Although the testimony of its own witnesses established that the sources of the false information could be the customer (R17, p. 177), another salesman (R27, pp. 207-210), a sales team leader or manager (R21, pp. 36, 37; R33, pp. 194, 195), and not necessarily the salesman shown on the application itself, the use of the credit applications without a limiting instruction or the need to call the customer to authenticate it, identify the salesman, and testify as to the source of the false information under cross-examination, was plainly wrong. The

Government could (and did successfully) wave the nine credit applications before the jury, point to the false information each contained, and argue that the documents alone proved Mugford guilty of the three substantive counts and the conspiracy count charged.

As previously stated herein, the Arizona Supreme Court in *McGann*, *supra.*, alertly recognized the "fundamental error" ("error as goes to the foundation of the case, or which takes from the defendant an essential right," 645 P.2d at 813) posed by the wrongful use of the business records hearsay exception in such a manner as affords the jury to consider the implied statements of third parties which are contained in business records:

> "...The effect of the station manager's testimony was to introduce the out-of-court statements of [the customers] to Chevron to prove that their signatures were not

> authorized." 645 P.2d at footnote 1, p. 814.

The fundamental right referred to, though not specifically stated in the opinion, was the right to confront the witnesses on the issue of whether their signatures were authorized by them. This is exactly the issue posed in this appeal.

This Court has long acknowledged that the "the hearsay rules and the Confrontation Clause are generally designed to protect similar values." *California v. Green*, 399 U.S. 149, 155, 90 S.Ct. 1930, 1933, 26 L.Ed.2d 489 (1970). The Confrontation Clause "was intended to exclude some hearsay * * * [and] reflects a preference for face-to-face confrontation at trial." *Ohio v. Roberts*, 448 U.S. 58, 63, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597 (1980), *citing Green, supra.*, 399 U.S. at 157, 90 S.Ct. at 1934 ["it is

this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause"] and *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965). Quoting *Mattox v. United States*, 156 U.S. 237, at 242-243, 15 S.Ct. 337, at 339, 39 L.Ed. 409 (1895), the *Roberts* opinion continues: "In short, the Clause envisions

> 'a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but also of compelling him to stand face to face with the jury so they may look at him and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.'" 448 U.S. at 63-64, 100 S.Ct. at 2536-2537.

The search for truth underlies this right of an accused to confront those whose words would serve to deny him personal

liberty and stain his name.

However, exceptions exist. In the general case when a hearsay declarant is not present for cross-examination at trial, his prior statement can be admitted if there is a required showing that he is unavailable and if his statement bears "adequate 'indicia of reliability'." *Id.*, at 2539. "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.*

But in this case the evidence was improperly admitted outside a "firmly rooted hearsay exception." The source of the information was not acting within the scope of employment and possessed a strong motivation to misrepresent his credit

history and financial status to qualify for a car loan. The business records exception was therefore wrongfully applied as the basis for admission of the credit applications, and no other hearsay exception applied to permit their introduction.

This is unlike the cases decided by this Court which have allowed hearsay evidence to be considered under circumstances in which the hearsay was clothed with adequate indicia of reliability.

For instance, in *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), the confrontation issue arose "because the jury was being invited to infer that [the non-testifying declarant,] Williams had implicitly identified Evans as the perpetrator of the murder when he blamed Evans for his predicament [in a

statement made to Shaw, who did testify]." *Id.*, 400 U.S., at 88, 91 S.Ct., at 219. This is not unlike the Government's use of the credit applications here to invite the jury to infer Mugford was the person falsifying the credit applications, rather than the customer or someone else. While this Court in *Dutton*, found there were at least four factors surrounding the circumstances of Williams' statement to Shaw to clothe it with "indicia of reliability," 400 U.S., at 89, 91 S.Ct., at 219-220, to properly place it before the jury without confrontation of the declarant, no such circumstances exist in this case to render the implied statements of the customers "adequately reliable." The admission of the credit applications without customer testimony radically departs from the prior decisions of this Court which "make it clear that the

mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact has a satisfactory basis for evaluating the truth of the prior statement.'" *Id.*, *quoting*, *California v. Green*, 399 U.S., at 161, 90 S.Ct, at 1936.

In fact, no better example of the effectiveness of cross-examination to ferret out the truth, nor the injustice that results when the right is impugned by judicial error, exists than in the matter now before this highest Court.

Only two of the eleven customers whose credit applications were in evidence against Mugford were called: Mosley and Burns. The Government made no representation that the other nine were unavailable. Because the Government called no other customers whose credit

applications showed Mugford to be the salesman, it must be inferred that these two witnesses represented, in the Government's opinion, the strongest testimony available to prove Mugford falsified customer credit applications.

When Mugford was afforded his constitutional right to "test the recollection and sift the conscience" of these witnesses, he was proved not guilty of fraud. Neither customer Mosley nor customer Burns could identify him as the salesman in their transactions, neither of them could properly recall his name, and each was shown by other evidence presented in Mugford's defense to have lied to the jury on direct examination.

The jury, being afforded the opportunity to "look at [Mosley] and judge by his demeanor upon the stand and the manner in which he [gave] his testimony

whether he [was] worthy of belief," did not judge him well. Mosley was found by them not to be "worthy of belief" and the jury acquitted Mugford of the charges in Count 50.

Although the credit application of Burns did not figure in a substantive count of the indictment, it did have value to the Government's case as to the conspiracy charge. But as a witness to Mugford's wrongdoing, Burns fared no better than Mosley. His testimony was so discredited on cross-examination the Government conceded in its closing argument to the jury that Mugford did not put the false information on the Burns credit application, Taylor did. (R44, pp. 42, 43).

As to the remaining nine credit applications, no other customer testified, including those whose credit applications

were the basis for the substantive counts of mail fraud, bank fraud and submitting a false loan application to a federally insured bank. No coconspirator, indicted or unindicted, testified Mugford either knew of the conspiracy or participated in it.

Given the opportunity to confront the nine other customers in open court, Mugford may have been able to discredit their evidence as he was able to do with Burns and Mosley. But because he was denied this fundamental right of confrontation, Mugford, an innocent man, was convicted of crimes he did not commit.

III. THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE CONVICTIONS FOR FRAUD AND CONSPIRACY

In order to prove Mugford guilty of the three remaining substantive fraud counts and the conspiracy count the

Government had to prove all elements of each offense charged and persuade the jury beyond a reasonable doubt of the facts necessary to establish each of those elements. *Sullivan v. Louisiana*, ___ U.S. ___, 113 S.Ct. 2078, _____ L.Ed.2d ____ (1993). Although the proof may be by direct evidence or by circumstantial evidence, *Holland v. United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954), *reh'g denied*, 348 U.S. 932, 75 S.Ct. 334, 99 L.Ed. 731 (1955), it must be sufficient to overcome the presumption of innocence to which each person is entitled under the Due Process Clause of the Fifth Amendment to the Constitution. The evidence does not have to exclude every hypothesis of innocence, or be inconsistent with every reasonable hypothesis except guilt, but "if a [*sic*] hypothesis of innocence is sufficiently

reasonable and sufficiently strong, then a reasonable trier of fact *must* necessarily entertain a reasonable doubt about guilt." ***United States v. Bell***, 678 F.2d 547, 550 (5th Cir. 1982)[7], *aff'd on other grounds*, 462 U.S. 356, 103 S.Ct. 2398, 74 L.Ed.2d. 638 (1983). Moreover, a conviction cannot stand if it is based "by piling inference upon inference." ***Ingram v. United States***, 360 U.S. 672, 680, 79 S.Ct. 1314, 1319, *quoting* ***Direct Sales Co. v. United States***, 319 U.S. 703, 711, 63 S.Ct. 1265, 1269, 87 L.Ed. 1674 (1943).

Having successfully rebutted the Government's evidence presented through the testimony of Burns and Mosley that he was the source of the false information on their credit applications, the sole evidence against Mugford was the credit

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[7] Special concurring opinion of Judge Anderson, joined by Judge Roney.

applications of the customers who did not testify. Even when viewed in the light most favorable to the Government, *Glasser v. United States*, 315 U. S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), the evidence fails to establish facts sufficient to permit a reasonable trier of fact to infer that Mugford falsified any of the credit applications in evidence or that he was a voluntary participant in the conspiracy.

No evidence was adduced at trial to link Mugford to any wrongdoing. No witness testified Mugford was aware of, or participated in, the conspiracy alleged. No customer identified him as being the salesman in any of the transactions charged in the indictment. No one identified his handwriting as being on any of the credit applications in evidence. His name appearing on the face of the credit applications is alone insufficient

to prove, either directly or by implication, that Mugford had any involvement in the transactions. ***United States v. Lieberman***, *supra*. In summary, there was absolutely no fact in evidence to prove Mugford falsified any credit application or voluntarily joined in the conspiracy alleged.

Given the absence of direct evidence to support them, one must conclude Mugford's convictions in the four counts only could be the result of the jury improperly "piling inference upon inference."

To reach such a conclusion the jury would first have had to infer that Mugford was the salesman in the credit transactions in questions. There was no fact in evidence to establish this inference.

The jury then would have had to infer

that Mugford put the false information on the credit applications. There was no fact in evidence to support this inference. To the contrary, there was evidence to conclude Mugford did not put any false information on any credit applications, as was demonstrated in the Mosley and Burns transactions.

In order for the convictions of bank fraud of this type to stand the Government had to prove beyond a reasonable doubt Mugford knowingly made a false statement to a financial institution. *See, United States v. Thompson*, 811 F.2d 841 (5th Cir.1987). Although the Government's evidence did sufficiently prove that some employees of Royal Buick conspired with one another and with an officer of Florida National Bank in conduct defrauding the bank, Mugford's mere business association with them is insufficient to sustain his

convictions. *See*, ***Canning v. United States*** 119 F.2d. 130 (9th Cir.1941); ***United States v. Grassi***, 616 F.2d 1295 (5th Cir.1980), *cert. denied*, 449 U.S. 956, 101 S.Ct. 363, 66 L.Ed.2d 220 (1980).

In a case very similar to that of Mugford's the Fifth Circuit reversed the conspiracy convictions due to insufficiency of the evidence. Determining the questioned conduct upon which the charges were based could be legal or illegal, the court reasoned the Government must prove both a departure from the legal conduct, and an agreement and overt act in furtherance of the illegal objective. "It is not enough for [the Government] to merely establish a climate of activity that reeks of something foul." ***United States v. Weischenberg***, 604 F.2d 326, 332 (5th Cir.1979). The Government's evidence against Mugford failed in those aspects.

In this case, Mugford was at all relevant times employed as a car salesman, a legal occupational pursuit. Albeit the Government proved some of his co-workers departed from that legal activity to engage in illegal conduct, that is not a sufficient basis in law to conclude beyond a reasonable doubt that Mugford did likewise. It is not the conduct or pattern of fraud proved against his co-workers that is at issue, but the pattern of conduct of Mugford that controls this case.

That the jury had reasonable doubt that Mugford joined the conspiracy alleged and falsified the credit applications of customers is evidenced by its not guilty verdict in Count 50 involving customer Mosley. When, as here, the facts adduced at trial establish at most a mere probability that the defendant committed

the crimes charged, a reasonable jury must find him not guilty. ***Wieschenberg***, **604 F.2d, at 332 and 335** ("evidence that establishes no more than a choice of reasonable probabilities cannot be said to be sufficiently substantial to sustain a criminal conviction on appeal * * * juries 'must not be permitted to convict on suspicion and innuendo'").

Because the Government failed to meet its burden of proof against Mugford on the counts charged, all his convictions must be reversed.

CONCLUSION

An evidentiary ruling that permits the implied hearsay of third parties contained in business records to be considered by the jury is plainly wrong and is fundamental error so prejudicial to the accused that his convictions based thereupon must be reversed. The confusion the Eleventh Circuit exhibits in its decision in this case, coupled with its conflict with similar cases decided in other federal circuits, requires this Court's intervention and resolution of the issue.

The error is compounded when the wrongful admission of the evidence denies the accused his fundamental right to confront and cross-examine his accusers, nor allows the jury to judge their credibility, and ultimately has the effect of reducing the Government's burden of

proof of the crimes charged.

Notwithstanding these factors, when the jury has expressed reasonable doubt of guilt in the face of the Government's best evidence against the accused, and the Government has failed to link the accused by either direct or circumstantial evidence to the criminal fraud charged, a reasonable jury must find reasonable doubt of his guilt to the remaining charges.

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